PREME COURT, U. S.

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309

IN THE SUPREME COURT OF THE UNITED STATES

1969

EDWARD H. BREEN

VERSUS

OTIS ELEVATOR COMPANY and
THE EMPLOYERS ASSURANCE CORPORATION

PETITION OF EDWARD H. BREEN FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF LOUISIANA

STEVEN R. PLOTKIN
Attorney for Petitioner
9th Floor - 305 Baronne St.
New Orleans, Louisiana

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1.

Reference to the official and unofficial reports of the opinions delivered in the courts below.

The memorandum opinion of the Supreme Court of Louisiana is reported at _____ La. _____, 220 So 2d 458 (1969)

The opinion of the Louisiana Court of Appeal for the Fourt Circuit is reported at 217 So 2d 776 (1969)

2.

Statement of the Grounds upon which the jurisdiction of this Court is invoked.

Jurisdiction is invoked under 28 U.S.C. Sec. 1257 (3), in that petitioner has specially claimed, under the Fourteenth and Seventh Amendments to the Constitution of the United States, the right to have the facts determined by a jury in this cause held immune from reexamination otherwise than according to the rules of the common law, which claim has been denied, and in that the Court of Appeals of Louisiana has in this cause interpreted and applied Section 29 of Article 7 of the Constitution of Louisiana in a manner repugnant to the Fourteenth and Seventh Amendments to the Constitution of the

United States.

The judgment of the Supreme Court of Louisiana, here sought to be reviewed, was dated and entered on April 3, 1969. No re-hearing was sought.

3.

The questions presented for review.

1. Are not the privileges and immunities secured to petitioner against Federal action by the Seventh Amendment to the Constitution of the United States, secured to him also against state action by the privileges and immunities clause of the Fourteenth Amendment, and by the due process clause of the Fourteenth Amendment?

2. Has not the petitioner been denied those privileges and immunities by the action of the Court of Appeal of Louisiana, in reversing a judgment entered by the trial court on a jury verdict in favor of petitioner, the sole ground for the reversal being the appellate court's conclusion that the injuries of which petitioner had complained had been caused by his contributory negligence?

Constitutional provisions involved.

1. The Seventh Amendment to the Constitution of the United States.

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

2. The Fourteenth Amendment to the Constitution of the United States (in part).

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws."

3. Section 29, Article 7 to the Constitution of Louisiana (in part).

> "All appeals of which the courts of appeal have appellate jurisdiction as provided in this Section shall be on both the law and the facts, except where the appeal is limited to questions of law only by any other Section of this Constitution."

Statement of the Case.

Edward Breen filed suit in the Civil District Court of the Parish of Orleans, State of Louisiana, to recover damages for injuries received when he fell into an elevator shaft in the Ponchartrain Hotel in New Orleans. Defendants were Otis Elevator Company, which is not involved in the present petition, E. Lysle Aschaffenburg and Albert Aschaffenburg, alleged tortfeasors, and the Employers Liability Assurance Corporation, sued under Louisiana's direct action statute as the insurer of the Aschaffenburgs. Trial was by jury, and the verdict was in favor of Breen and against the two Aschaffenburgs and their insurer. The trial court entered judgment on the verdict. On appeal, the Court of Appeals for the Fourth Circuit reversed, and rendered judgment in favor of the defendants, dismissing petitioner's demands. The Court of Appeals issued an opinion stating that its disposition of the matter was based on its finding that petitioner's injuries had been caused by his contributory negligence. Petitioner applied for and was refused a re-hearing. Petitioner applied to the Supreme Court of Louisiana for writs of certiorari and review. Writs were refused.

The Constitutional questions on which this petition is founded were first raised by petitioner in his petition for

re-hearing addressed to the Court of Appeal. (Record in Court of Appeal, Vol. II, page 13 of the petition for re-hearing), and were again raised in the application to the Supreme Court of Louisiana. (Record in Supreme Court of Louisiana, page of application for writs.)

Argument.

When it was suggested at the Constitutional Convention that the right to jury trial in civil cases ought to be protected, it was thought that, because the practices of the state varied so widely, no acceptable rule could be formulated.[1] When the omission was corrected, by the Seventh Amendment, the problem of varying state practices was solved by ignoring them. It was the essence of the jury trial which was to be protected, and not the accidents. Only one characteristic of the jury trial--aside from its availability--was singled out for mention; that a fact, once determined by a jury, was not to be reexamined in any court except by the rules of the common law.[2]

The draughtsmen of the amendment recognized that this attribute of finality, above all others, was fundamental to the jury's role in the society they were bent on preserving, and on

building. Indeed, some doubts whether the finality of the jury verdict had been compromised, had nearly prevented the ratification of the Constitution.[3]

Justice Story thought the expressed doubts were specious. Though the ambiguity of the Constitutional language might justify the idea that appellate review of jury found facts were constitutionally permissible, there was no danger at all that Congress would ever permit the exercise of such a power,

> "... since it would be at varience with all the habits, feelings, and institution of the whole country. At least it might be affirmed, that Congress would scarcely take such a step, until the people were prepared to surrender all the great securities of their civil, as well as of their political rights and liberties; and in such an event the retaining of the trial by jury would be a mere mockery."[4]

Louisiana has done precisely what Mr. Justice Story was sure the Congress would never do. The Constitution of Louisiana gives its appellate courts authority to reexamine the facts determined in the trial courts, whether by judge or by jury.[5] In the case on which we now seek review, the Court of Appeals simply, casually, and -- according to prevailing Louisiana theory -- quite properly, substituted its own judgment for that of the jury in deciding whether the plaintiff had been guilty of contributory negligence.

Unquestionably, if the Seventh Amendment has any effect at all upon the trial of cases in the courts of Louisiana, the

action of the Louisiana Court, in this case was, and the provision of the State Constitution on which it relied is, repugnant to the constitution of the United States.

This Court has long ago held that the Seventh Amendment has no reference to the state Courts.[6] But that was done when it was thought that none of the protections of the Bill of Rights restricted state action, long before the development of the Fourteenth Amendment whose history this Court has traced so often -- most recently in Duncan v. State of Louisiana.[7] This Court has not yet considered the question which now must be asked concerning the Seventh Amendment; whether the values it protects are "fundamental to the American scheme of Justice",[8] and therefore protected from state encroachment by the Fourteenth Amendment.

It is clear enough that had the question been presented in that way to Mr. Justice Story, he would have answered in the affirmative.[9] To him the right of trial by jury, civil as well as criminal, was so fundamental that the legislative authority could not tamper with it as Louisiana has done "until the people were prepared to surrender all the great securities of their civil, as well as of their political rights and liberties."

Blackstone certainly thought the civil jury trial essential to the scheme of justice which prevailed in England when he wrote. He thought the civil jury trial was embedded in Magna

Carta.[10] If he erred in that,[11] it is fair to say that he did not think the jury trial was fundamentally important because he thought it was in Magna Carta -- rather he thought it was in Magna Carta because he knew that it was fundamentally important.

The right to the civil jury trial was among those cataloged in the Massachussetts Body of Liberties in 1641.[12] English tampering with it was among the grievances recited by the Second Continental Congress in its Declarations of Causes and Necessity of Taking Up Arms.[13] And the civil jury trial was protected by the Virginia Bill of Rights, which said that it "ought to be held sacred,"[14] as did the Bill of Rights of several of the original states.[15]

This Court has recently had occasion to review much of the modern literature of controversy over jury trials.[16] The Court is aware that the very large volume of criticism based on the jury's supposed incompetence has been profoundly undercut by a recent study whose conclusions are based not on intutition but on observation and careful measurement, and the Court has summarized a very important part of the results of that Study in these words:

> "[T]he most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conslusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving

some of the very purposes for which they were created and for which they are now employed."[17]

The report to which the Court referred dealt primarily with the criminal jury; but other material from the same project shows that the statement is equally true of juries in civil cases.[18]

If juries did no more than understand the law as explained to them, and reach conclusions on factual matters about as well as judges would reach them, then they would not be as bad as their detractors imagine, but they would hardly be indispensible. The civil jury is not fundamental to the American scheme of justice because it can find facts about as well as a judge can; the jury is fundamental because of what it does far better than a judge or a panel of judges could -- the expression of the will of the community in matters that cannot be formulated in precise rules, or that our society prefers not to formulate in precise rules. The assessment of general damages is one example.[19] The evaluation of a particular instance of human conduct as negligent or not negligent is another.[20]

In the present case, what the plaintiff did was not in dispute; the issue was whether what he did was negligent -- whether his conduct conformed to the community standards of conduct acceptable in the circumstances. In this case, the crucial

issue turned out to be whether the jury's appreciation of those community standards would prevail, or the appellate judges' appreciation. The difference is the difference between two systems of justice, and the question is not which is preferable but which is the American system.

The question is not whether a legal system in which juries are freely overruled by appellate panels is or can be "fair". One significance of the Fourteenth Amendment is that we are not several peoples but one, and one significance of Duncan, as we appreciate it, is that where fundamentals are concerned, we have not fifty or fifty-one systems of justice, but one.

One of the men best equipped with factual information to discuss the role of the jury and how well juries perform in that role has said "Sometimes I suspect that the Jury issue will go to whichever side does not have the burden of proof."[21] Whose is the burden of proof in the present debate?

We submit that at least a prima facie case has already been made for the fundamental importance of any right which has been incorporated in the Bill of Rights. The fundamental importance of the jury was recognized long before the Bill of Rights was drawn. The most modern defenders of the jury support it for reasons very like those that Blackstone advanced,[22] meanwhile showing that attacks on the jury become less con-

vincing the more they are subjected to empirical test.

Until we are sure that Blackstone was wrong when he identified the jury as an essential bulwark against aristocracy, it behooves us to treat it as one of the fundamental institutions of the social order that has evolved and is evolving under the protection of the Bill of Rights. And so long as the jury is accorded the status of a fundamental institution of our social order, we cannot permit its power to be vitiated by judicial review. Whoever would argue that the civil jury is not essential to the American system of justice ought to be required to prove that something else exists which can equally well express the will of the community.

Wherefore, we respectfully submit that a writ of certiorari should be granted.

PLOTKIN, SAPIR AND BRADLEY

Steven R. Plotkin

STEVEN R. PLOTKIN

NOTES

1. Perry, Ed. Sources of Our Liberties 404, 405 (1952)

2. U. S. Constitution, Amendment 7

3. 3 Story, Commentaries on the Constitution of the United States 628 (1833)

4. Id., 629

5. Art. 7, Sec. 9, Const. of Louisiana

6. Walker v Sauvinet, 2 Otto 93, (1876); Minnesota, etc. R. Co. v Bombolis, 241 U.S. 211 (1916)

7. Duncan v State of Louisiana, 391 U. S. 145 (1968)

8. Id., 149

9. Story, op. cit. supra, n. 3 at 629

10. 2 Blackstone, Commentaries on the Law of England 271 (Chittg, Ed. 1859)

11. Duncan v State of Louisiana, 391 U. S. 145, 149 (1968)

12. Perry, op. cit. supra, n. 1, at 151

13. Id., 296

14. Id., 312

15. Id., 309, 330, 356, 366, 376, 384

16. Duncan v State of Louisiana, 391 U. S. 145 (1968)

17. Id., 157

18. Kalven, The Dignity of the Civil Jury, 50 Va. L. Rev. 1055 (1964)

19. Kalven, The Jury, the Law and the Personal Injury Damage Award, 19 Ohio St. L. J. 157 (1958)

20. Kalven, The Dignity of the Civil Jury, 50 Va. L. Rev. 1055, 1071, 1072 (1964)

21. Id., 1074

22. Cf. Kalven, supra n. 20, with Blackstone, supra, n. 10

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing petition upon Dermot S. McGlinchey, attorney for E. Lysle Aschaffenburg and Albert Aschaffenburg and the Employers Liability Assurance Corporation, by depositing said copy in the United States mail addressed to him at the Hibernia Bank Building, New Orleans, Louisiana, 70112, postage prepaid.

New Orleans, Louisiana, July 1, 1969.

Steven R. Plotkin

STEVEN R. PLOTKIN

Edward H. BREEN

v.

OTIS ELEVATOR COMPANY and the Employers Liability Assurance Corporation.

No. 3201.

Court of Appeal of Louisiana.

Fourth Circuit.

Jan. 6, 1969.

REGAN, Judge.

The plaintiff, Edward H. Breen, filed this suit against the defendants, Otis Elevator Company, the Employers Liability Assurance Corporation, its liability insurer, E. Lyle Aschaffenburg and Albert L. Aschaffenburg, endeavoring to recover the sum of $80,000.00, representing damages for personal injuries which he asserts were incurred as the result of the negligence of the defendants in causing him to fall into an elevator shaft.

The defendants answered, and denied the plaintiff's accusations of negligence and then pleaded his contributory negligence as an affirmative defense. The Aschaffenburgs pleaded the prescription of one year predicated on the fact they were neither sued nor served until more than a year had elapsed from the date of the plaintiff's injury.[1] The Bituminous Casualty Corporation, the workmen's compensation insurer of the Pontchartrain Hotel, wherein the plaintiff's accident occurred, intervened herein in order to recover compensation which it had paid to the plaintiff in conformity with the requirements of the statute.

The trial occurred before a jury, which returned a verdict in favor of the plaintiff and against the Aschaffenburgs in the amount of $38,200.00. The jury found no negligence on the part of Otis Elevator

1. After the trial, the Aschaffenburgs again pleaded the prescription of one year by means of an exception, and this exception was overruled.

Company or its insurer. Judgment was also rendered in favor of Otis Elevator Company and its insured dismissing the plaintiff's suit as to them. While the trial court inadvertently omitted rendering judgment in favor of Bituminous Casualty Company for workmen's compensation paid by it, counsel for all of the litigants have agreed and then stipulated in this court that judgment should be rendered in favor of Bituminous for workmen's compensation paid in the event that the plaintiff's award should be affirmed by us.

From the foregoing judgment, both the plaintiff and the Aschaffenburgs have prosecuted this appeal.

The record discloses that the plaintiff was employed as a bellman at the Pontchartrain Hotel in New Orleans. The Aschaffenburgs are owners of the Pontchartrain Hotel Corporation; however, they were not sued as owners thereof, but as co-employees or fellowservants of the plaintiff.[2]

The plaintiff, a twenty-one year old college student, was temporarily employed at the hotel from March 18, 1966, until July 12, 1966, the date of the accident. He worked six days each week, customarily on the 7:00 A.M. to 3:30 P.M. shift. During the entire period of his tenure, he used the elevator without incident, with the exception of the one which forms the subject matter of this suit.

The lobby of the hotel contains two elevators. The public elevator was installed in 1955, and it is an automatic push button type which is operated by its passengers. The other elevator was installed in 1926 and is used only by hotel personnel. It is only susceptible of manual operation because of the vintage of its manufacture.

2. See Jolly v. Travelers Ins. Co., La.App., 161 So.2d 354 (1964); Daigle v. Cobb, La.App., 175 So.2d 392 (1965).

The plaintiff testified that he operated this elevator on an average of twenty or thirty times per day during the period of his employment. The door thereof was normally opened by means of a cylindrical piece of metal commonly referred to in the trade as a lunar or emergency key, which was usually kept at the registration desk. In order to open the elevator door, the lunar key was inserted in a hole provided therefor whereupon it would depress a bar behind the door, referred to as a straight arm closure, which in turn would cause the door to open. The elevator was not equipped with what has been designated as an interlocking or parking device, which would assure that the door leading to the elevator could not be opened without the elevator car being at that particular floor without the use of an additional key.

In any event, the plaintiff opened the door with the lunar or emergency key and unfortunately the elevator was not at the floor level. He stepped into the elevator shaft, fell approximately seven or eight feet, and struck his shoulder on an iron beam near the bottom of the shaft. When interrogated with respect to his behavior immediately preceding the accident, he made the following significant statement:

"I started to slide the door open. Somebody distracted me, I turned around and as I turned, I pushed the door open and walked in backwards without looking."

It is not disputed by plaintiff's counsel that this statement was made nor does he dispute the fact that this was the manner in which the plaintiff actually entered the elevator shaft. On the contrary, plaintiff's

3. See Stein v. General Necessities Corp., 232 Mich. 322, 205 N.W. 104 (1925); Lee v. Carolina Upholstery Co., 227 N.C. 88, 40 S.E.2d 688 (1946); Writtenberry v. McKee, General Contractor, Inc., Tex. Civ.App., 337 S.W.2d 197 (1960).

4. See Taustine's Executor v. B. and B. Novelty, 305 Ky. 514, 204 S.W.2d 938

counsel insists that an individual who is about to use an elevator is entitled to rely on his safe experiences derived from his customary usage thereof and the elevator's dependability of operation, and he may, therefore, walk or step into this area without first looking in order to ascertain that the elevator is parked or stopped at the floor level. It is conceded that a light was continuously burning in the elevator, and that the plaintiff would have noticed the absence of a light before him if he had looked in the direction in which he was walking.

We have observed heretofore that when a suit is predicated upon an allegation of negligence and the defense thereto is a denial of negligence and an alternative plea of contributory negligence, it is often expedient to initially consider the plea of contributory negligence, for if the facts disclose the existence of contributory negligence without which the accident would not have occurred, it is then unnecessary to determine whether there was primary negligence in the defendant.

[1-4] Our analysis of the rationale emanating from the jurisprudence leads us to the inevitable conclusion that the plaintiff was guilty of contributory negligence without which the accident would not have occurred. To reiterate for the purpose of emphasis, the plaintiff testified that as he was opening the door leading to the elevator, someone called to him, and he stepped into the elevator shaft as he looked backwards or to the side in the direction from which the voice came. The jurisprudence is emphatic to the effect that it is negligent to step backwards into an elevator shaft.[3] Moreover, it is also negli-

(1947); Cox v. Bondurant, 220 Mo.App. 948, 7 S.W.2d 403 (1925).

5. Gorbulove v. Buttnick, 39 Wash.2d 266, 235 P.2d 158 (1951); Ridley v. National Casket Co., 161 N.Y.S. 444 (1916).

6. La.App., 145 So.2d 588 (1962).

gence to step into an elevator while looking to the rear.[4] This rationale stems from the basic concept that it is negligence for a person to open the door leading to an elevator and step therein without looking.[5]

The plaintiff's hypothesis that he is entitled to anticipate the elevator's mechanical predictability, and thereby walk through the door leading to the elevator shaft without first looking to ascertain the presence of the elevator car at his floor level is predicated on the Louisiana case of Johnson v. Johness,[6] wherein the court awarded the plaintiff damages by virtue of her falling into an elevator shaft. However, a cursory examination of the Johness case discloses that it is inapposite to the facts posed for our consideration herein. In that case, a domestic employee was permitted to use a private elevator in the home of her employer. The elevator was equipped with an interlocking device which was designed to prevent the opening of the elevator door, which was activated by a push botton, if the elevator car was not at the appropriate level. However, on the unfortunate day of the accident the interlocking device failed, and the plaintiff walked into the elevator shaft and injured herself. While the elevator in the Johness case was equipped with a light, the plaintiff's employer had instructed her to keep the light out except when the elevator was in operation. In order to turn the light on, it was necessary to walk to the rear of the elevator car, where it was located. The plaintiff looked into the dark, and assuming the car was there, stepped in so as to reach the light switch which, to reiterate, was located at the back of the elevator. In the course of this endeavor, she fell and sustained grievous injuries.

The facts of the Johness case are obviously inapplicable to this case. There the maid exercised that degree of caution required of one using an elevator by in-

itially looking in an endeavor to ascertain that it was there. Since the light was to remain turned off, it was necessary that she grope in the dark before reaching the rear of the car where she could turn it on. However, in this case, the plaintiff admittedly did not exercise that minimum degree of care by looking in the direction in which he was walking in order to ascertain the presence or absence of the elevator. If he would have done so, he would have noticed that the shaft was dark, and he therefore, would have concluded that the car was not parked at his floor level. However, he acted imprudently by stepping into the elevator shaft without taking the basic precaution of first observing where he was walking. Our evaluation of these facts has convinced us that the sole and proximate cause of the plaintiff's injury was his own negligence in not exercising that degree of prudence which the environment of the accident dictated.

In view of the foregoing conclusion, it is unnecessary for us to engage in a discussion of the negligence of the defendants nor to consider the Aschaffenburg's plea of prescription.

For the foregoing reasons, the judgment of the lower court in favor of the plaintiff and against E. Lyle Aschaffenburg and Albert L. Aschaffenburg is reversed, and judgment is now rendered in favor of the defendants dismissing the plaintiff's suit at his cost. The judgment of the lower court dismissing Otis Elevator Company and the Employers Liability Assurance Corporation is affirmed. The plaintiff is to pay all costs incurred herein.

Affirmed in part, reversed in part, and rendered.

Edward H. BREEN

v.

OTIS ELEVATOR COMPANY and The Employers Liability Assurance Company.

No. 49726.

Supreme Court of Louisiana.

April 3, 1969.

In re: Edward H. Breen applying for certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, Parish of Orleans. 217 So.2d 776.

Writs refused. On the facts found by the Court of Appeal there appears no error of law in its judgment.

FOURNET, C. J., is of the opinion the application should be granted.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 309

EDWARD H. BREEN,

Petitioner,

versus

OTIS ELEVATOR COMPANY and
THE EMPLOYERS LIABILITY ASSURANCE
CORPORATION LIMITED and
E. LYSLE ASCHAFFENBURG and
ALBERT L. ASCHAFFENBURG,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

CHARLES K. REASONOVER
and
DERMOT S. McGLINCHEY
ATTORNEYS FOR RESPONDENTS
1800 Hibernia Bank Building
New Orleans 70112

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 309

EDWARD H. BREEN,

Petitioner,

versus

OTIS ELEVATOR COMPANY and
THE EMPLOYERS LIABILITY ASSURANCE
CORPORATION LIMITED and
E. LYSLE ASCHAFFENBURG and
ALBERT L. ASCHAFFENBURG,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

STATEMENT OF THE CASE

Applicant filed a civil suit in the Civil District Court for the Parish of Orleans, State of Louisiana to recover damages for personal injuries received while in the course and scope of his employment, as a bellman at the Pontchartrain Hotel in New Orleans. Since the Louisiana Workmen's Compensation Law* provides an exclusive remedy as to the employer, applicant sued E. Lysle

*Applicant received benefits under this act and also filed a suit for additional benefits against the hotel corporation and its insuror, Bituminous Casualty Corporation.

Aschaffenburg and Albert L. Aschaffenburg personally as executive officers and stockholders of the Pontchartrain Hotel Corporation, together with Otis Elevator Company and its insuror, The Employers Liability Assurance Corporation Limited. Plaintiff was the sole witness to the accident and his version of the accident was not challenged by defendants in either the trial or appellate courts. The Jury returned a verdict in favor of applicant and against the Aschaffenburgs only and the Louisiana Court of Appeal, Fourth Circuit reversed and held that plaintiff could not recover as a matter of law based on the uncontested facts of the accident. A rehearing in the Court of Appeal was denied and the Supreme Court of Louisiana denied a writ of certiorari.

The issue presented to the Court is whether Amendment No. VII to the United States Constitution prohibits a state applellate court from reversing as a matter of law a jury verdict where the facts are undisputed.

ARGUMENT

The constitutional issue raised in the application for writs is spurious. The facts of the accident were uncontested in the trial and appellate courts since plaintiff was the sole witness to the accident.[1] The Court of Appeal simply held that applicant's uncontested account of his accidents was an insufficient basis as a matter of law for recovery from respondents.[2] In directing a verdict for respondents, in effect, the state appellate courts acted with the same authority as federal courts under the same circumstances since Amendment VII to the United States

[1]Decision of the Louisiana Court of Appeal, Fourth Circuit, Appendix "A".

[2]Decison of the Supreme Court of Louisiana, Appendix "B".

Constitution does not deprive federal courts from directing verdicts for insufficiency of evidence.[3] Likewise, Amendment[4] VII does not grant a litigant an unrestricted right to trial by jury since a judgment notwithstanding the verdict may be constitutionally entered in appropriate cases[4] and neither does the granting of a motion for summary judgment violate the jury trial guarantee of such amendment.[5] It is submitted that the circumstances of this case do not support the application for a writ of certiorari.

Respectfully submitted,

CHARLES K. REASONOVER

and

DERMOT S. McGLINCHEY
of
DEUTSCH, KERRIGAN & STILES
ATTORNEYS FOR RESPONDENTS
E. LYSLE ASCHAFFENBURG and
ALBERT L. ASCHAFFENBURG
1800 Hibernia Bank Building
New Orleans 70112 (524-1221)

---

[3] *Galloway vs. United States*, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458, rehearing denied 320 U.S. 214, 63 S. Ct. 1443, 87 L. Ed. 1851 (1943); *Coughran vs. Bigelow*, 164 U.S. 308, 17 S. Ct. 117, 41 L. Ed. 442 (1896); *Sparf vs. U. S.*, 156 U.S. 99, 15 S. Ct. 273, 39 L. Ed. 343 (1895). See also Rule 50(a), Federal Rules of Civil Procedure.

[4] *Mentaia vs. Potomac Elec. Power Co.*, 268 F2d 793 (CA 4-1959), certiorari denied 361 U. S. 913, 80 S. Ct. 255, 4 L. Ed. 2d 183. See also Rule 50(b), Federal Rules of Civil Procedure.

[5] *U. S. vs. Stangland*, 242 F2d 843 (CA 7-1957). See also Rule 56, Federal Rules of Civil Procedure.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing answer to petition for writ of certiorari on Steven R. Plotkin, Esq., Attorney for Petitioner, 9th Floor, 305 Baronne Street, New Orleans, Louisiana 70112, by depositing same in the United States mail, postage prepaid, properly addressed to him at his office on this ..... day of July, 1969.

.....

DERMOT S. McCLINCHEY

APPENDIX "A"

EDWARD H. BREEN

v.

OTIS ELEVATOR COMPANY and The Employers Liability Assurance Corporation.

No. 3201

Court of Appeal of Louisiana

Fourth Circuit

Jan. 6, 1969

REGAN, Judge.

The plaintiff, Edward H. Breen, filed this suit against the defendants, Otis Elevator Company, the Employers Liability Assurance Corporation, its liability insurer, E. Lysle Aschaffenburg and Albert L. Aschaffenburg, endeavoring to recover the sum of $80,000.00, representing damages for personal injuries which he asserts were incurred as the result of the negligence of the defendants in causing him to fall into an elevator shaft.

The defendants answered, and denied the plaintiff's accusation of negligence and then pleaded his contributory negligence as an affirmative defense. The Aschaffenburgs pleaded the prescription of one year predicated on the fact they were neither sued nor served until more than a year had elapsed from the date of the plaintiff's injury.[1] The Bituminous Casualty Corporation, the

[1]After the trial, the Aschaffenburgs again pleaded the prescription of one year by means of an exception, and this exception was overruled.

workmen's compensation insurer of the Pontchartrain Hotel, wherein the plaintiff's accident occurred, intervened herein in order to recover compensation which it had paid to the plaintiff in conformity with the requirements of the statute.

The trial occurred before a jury, which returned a verdict in favor of the plaintiff and against the Aschaffenburgs in the amount of $38,200.00. The jury found no negligence on the part of Otis Elevator Company or its insurer. Judgment was also rendered in favor of Otis Elevator Company and its insured dismissing the plaintiff's suit as to them. While the trial court inadvertently omitted rendering judgment in favor of Bituminous Casualty Company for workmen's compensation paid by it, counsel for all of the litigants have agreed and then stipulated in this court that judgment should be rendered in favor of Bituminous for workmen's compensation paid in the event that the plaintiff's award should be affirmed by us.

From the foregoing judgment, both the plaintiff and the Aschaffenburgs have prosecuted this appeal.

The record discloses that the plaintiff was employed as a bellman at the Pontchartrain Hotel in New Orleans. The Aschaffenburgs are owners of the Pontchartrain Hotel Corporation; however, they were not sued as owners thereof but as co-employees or fellowservants of the plaintiff.*

The plaintiff, a twenty-one year old college student, was temporarily employed at the hotel from March 18, 1966, until July 12, 1966, the date of the accident. He

* See Jolly v. Travelers Ins. Co., La. App., 161 So.2d 354 (1964); Daigle v. Cobb, La. App., 175 So.2d 392 (1965).

worked six days each week, customarily on the 7:00 A.M. to 3:30 P.M. shift. During the entire period of his tenure, he used the elevator without incident, with the exception of the one which forms the subject matter of this suit.

The lobby of the hotel contains two elevators. The public elevator was installed in 1955, and it is an automatic push button type which is operated by its passengers. The other elevator was installed in 1926 and is used only by hotel personnel. It is only susceptible of manual operation because of the vintage of its manufacture.

The plaintiff testified that he operated this elevator on an average of twenty or thirty times per day during the period of his employment. The door thereof was normally opened by means of a cylindrical piece of metal commonly referred to in the trade as a lunar or emergency key, which was usually kept at the registration desk. In order to open the elevator door, the lunar key was inserted in a hole provided therefor whereupon it would depress a bar behind the door, referred to as a straight arm closure, which in turn would cause the door to open. The elevator was not equipped with what has been designated as an interlocking or parking device, which would assure that the door leading to the elevator could not be opened without the elevator car being at that particular floor without the use of an additional key.

In any event, the plaintiff opened the door with the lunar or emergency key and unfortunately the elevator was not at the floor level. He stepped into the elevator shaft, fell approximately seven or eight feet, and struck

his shoulder on an iron beam near the bottom of the shaft. When interrogated with respect to his behavior immediately preceding the accident, he made the following significant statement:

> "I started to slide the door open. Somebody distracted me, I turned around and as I turned, I pushed the door open and walked in backwards without looking."

It is not disputed by plaintiff's counsel that this statement was made nor does he dispute the fact that this was the manner in which the plaintiff actually entered the elevator shaft. On the contrary, plaintiff's counsel insists that an individual who is about to use an elevator is entitled to rely on his safe experiences derived from his customary usage thereof and the elevator's dependability of operation, and he may, therefore, walk or step into this area without first looking in order to ascertain that the elevator is parked or stopped at the floor level. It is conceded that a light was continuously burning in the elevator, and that the plaintiff would have noticed the absence of a light before him if he had looked in the direction in which he was walking.

We have observed heretofore that when a suit is predicated upon an allegation of negligence and the defense thereto is a denial of negligence and an alternative plea of contributory negligence, it is often expedient to initially consider the plea of contributory negligence, for if the facts disclose the existence of contributory negligence without which the accident would not have occurred, it is then unnecessary to determine whether there was primary negligence in the defendant.

(1-4) Our analysis of the rationale emanating from the jurisprudence leads us to the inevitable conclusion that the plaintiff was guilty of contributory negligence without which the accident would not have occurred. To reiterate for the purpose of emphasis, the plaintiff testified that as he was opening the door leading to the elevator, someone called to him, and he stepped into the elevator shaft as he looked backwards or to the side in the direction from which the voice came. The jurisprudence is emphatic to the effect that it is negligent to step backwards into an elevator shaft.[3] Moreover, it is also negligence to step into an elevator while looking to the rear.[4] This rationale stems from the basic concept that it is negligence for a person to open the door leading to an elevator and step therein without looking.[5]

The plaintiff's hypothesis that he is entitled to anticipate the elevator's mechanical predictability, and thereby walk through the door leading to the elevator shaft without first looking to ascertain the presence of the elevator car at his floor level is perdicated on the Louisiana case of Johnson v. Johness,[6] wherein the court awarded the plaintiff damages by virtue of her falling into an elevator shaft. However, a cusory examination of the Johness case discloses that it is inapposite to the facts posed for our consideration herein. In that case, a domestic employee was permitted to use a private elevator in the home of her employer. The elevator was equipped

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[3]See Stein v. General Necessities Corp., 232 Mich. 322, 205 N.W. 104 (1925); Lee v. Carolina Upholstery Co., 227 N.C. 88, 40 S.E.2d 688 (1946); Writtenberry v. McKee, General Contractor, Inc., Tex. Civ. App., 337 S.W.2d 197 (1960).

[4]See Taustine's Executor v. B. and B. Novelty, 305 Ky. 514, 204 S.W.2d 938 (1947); Cox v. Bondurant, 220 Mo. App. 948, 7 S.W.2d 403 (1925).

[5]Gorbulove v. Buttnick, 39 Wash.2d 266, 235 P.2d 158 (1951); Ridley v. National Casket Co., 161 N.Y.S. 444 (1916).

[6]La. App., 145 So.2d 588 (1962).

with an interlocking device which was designed to prevent the opening of the elevator door, which was activated by a push button, if the elevator car was not at the appropriate level. However, on the unfortunate day of the accident the interlocking device failed, and the plaintiff walked into the elevator shaft and injured herself. While the elevator in the Johness case was equipped with a light, the plaintiff's employer had instructed her to keep the light out except when the elevator was in operation. In order to turn the light on, it was necessary to walk to the rear of the elevator car, where it was located. The plaintiff looked into the dark, and assuming the car was there, stepped in so as to reach the light switch which, to reiterate, was located at the back of the elevator. In the course of this endeavor, she fell and sustained grievous injuries.

The facts of the Johness case are obviously inapplicable to this case. There the maid exercised that degree of caution required of one using an elevator by initially looking in an endeavor to ascertain that it was there. Since the light was to remain turned off, it was necessary that she grope in the dark before reaching the rear of the car where she could turn it on. However, in this case, the plaintiff admittedly did not exercise that minimum degree of care by looking in the direction in which he was walking in order to ascertain the presence or absence of the elevator. If he would have done so, he would have noticed that the shaft was dark, and he therefore, would have concluded that the car was not parked at his floor level. However, he acted imprudently by stepping into the elevator shaft without taking the basic precaution of first observing where he was walking. Our evaluation of these facts has convinced us that the sole and proximate cause of the plaintiff's injury was his own

negligence in not exercising that degree of prudence which the environment of the accident dictated.

In view of the foregoing conclusion, it is unnecessary for us to engage in a discussion of the negligence of the defendants nor to consider the Aschaffenburg's plea of prescription.

For the foregoing reasons, the judgment of the lower court in favor of the plaintiff and against E. Lysle Aschaffenburg and Albert L. Aschaffenburg is reversed, and judgment is now rendered in favor of the defendants dismissing the plaintiff's suit at his cost. The judgment of the lower court dismissing Otis Elevator Company and the Employers Liability Assurance Corporation is affirmed. The plaintiff is to pay all costs incurred herein.

Affirmed in part, reversed in part, and rendered.

APPENDIX "B"

EDWARD H. BREEN

v.

OTIS ELEVATOR COMPANY and

The Employers Liability Assurance Company

No. 49726

Supreme Court of Louisiana

April 3, 1969

In re: Edward H. Breen applying for certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, Parish of Orleans. 217 So.2d 776.

Writs refused. On the facts found by the Court of Appeal there appears no error on law in its judgment.

FOURNET, C. J., is of the opinion the application should be granted.